

1995

# State of Utah v. Casper Dunkel : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	.A10
	:	DOCKET NO. <u>950523-CA</u>
Plaintiff/Appellee,	:	Case No. 950523-CA
v.	:	
CASPER DUNKEL,	:	Priority No. 2
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR A VIOLATION OF THE CLANDESTINE DRUG LAB ACT, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37D-4 & 5 (1996), POSSESSION OF LYSERGIC ACID DIETHYLAMIDE IN A DRUG FREE ZONE WITH INTENT TO DISTRIBUTE, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1996), AND CARRYING A CONCEALED WEAPON, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-10-504 (1995), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING

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ORAL ARGUMENT NOT REQUESTED

FILED

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FELONY, IN VIOLATION OF UTAH CODE ANN.  
§ 58-37D-4 & 5 (1996), POSSESSION OF LYSERGIC  
ACID DIETHYLAMIDE IN A DRUG FREE ZONE WITH  
INTENT TO DISTRIBUTE, A FIRST DEGREE FELONY,  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from convictions for a violation of the Clandestine Drug Lab Act, a first degree felony, in violation of Utah Code Ann. § 58-37d-4 & 5 (1996), possession or use of lysergic acid diethylamide in a drug free zone with intent to distribute, a first degree felony, in violation of Utah Code Ann. § 58-37-8 (1996), and carrying a concealed weapon, a class A misdemeanor, in violation of Utah Code Ann. § 76-10-504 (1995), in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Ray M. Harding, presiding. This Court has jurisdiction to review this case pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1995).

STATEMENT OF THE ISSUE ON APPEAL AND  
STANDARD OF APPELLATE REVIEW

1. Did the trial court properly rely on the unchallenged presentence report and a substantially complete diagnostic evaluation in sentencing defendant to prison, rather than ordering a third supplemental evaluation before sentencing defendant? "Before [the reviewing court] will overturn the sentence given by the trial court, 'it must be clear that the actions of the judge were so inherently unfair as to constitute



an abuse of discretion.'" State v. Rhodes, 818 P.2d 1048, 1051 (Utah App. 1991) (citing State v. Gerrard, 584 P.2d 885, 887 (Utah 1978)).

2. Was defendant's trial counsel ineffective because he did not object to the presentence report or the diagnostic evaluation? "When . . . the claim of ineffective assistance of counsel is raised for the first time on appeal, [the appellate court] resolve[s] the issue as a matter of law." State v. Strain, 885 P.2d 810, 814 (Utah 1994). In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness;" and (2) that counsel's performance prejudiced the defendant. Id. (citing Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

##### **76-3-404. Presentence investigation and diagnostic evaluation - Commitment of defendant - Sentencing procedure.**

(1)(a)(i) In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days.

(ii) The Department of Corrections shall conduct a complete study and evaluation of the defendant during that time, inquiring into matters including:

(A) the defendant's previous delinquency or criminal experience;

(B) his social background;

(C) his capabilities;

(D) his mental, emotional, and physical health; and

(E) the rehabilitative resources or programs which may be available to suit his needs.

(b) (i) By the expiration of the commitment period, or by the expiration of additional commitment time the

court may grant, not exceeding a further period of 90 days, the defendant shall be returned to the court for sentencing and the court, prosecutor, and the defendant or his attorney shall be provided with a written diagnostic evaluation report of results of the study, including any recommendations the Department of Corrections or the Utah State Hospital believes will be helpful to a proper resolution of the case.

(ii) Any diagnostic evaluation report ordered by the court is supplemental to and becomes a part of the presentence investigation report.

(iii) After receiving the diagnostic evaluation report and recommendations, the court shall proceed to sentence a defendant in accordance with the sentencing alternatives provided under Section 76-3-201.

(2) Any commitment for presentence investigation under this section does not constitute a commitment to prison. However, any person who is committed to prison following proceedings under this section shall be given credit against his sentence for the time spent in confinement for a presentence investigation report.

#### **STATEMENT OF THE CASE**

Defendant, Casper Dunkel, was charged with a violation of the Clandestine Drug Lab Act, a first degree felony, in violation of Utah Code Ann. § 58-37d-4 & 5 (1996) (Count I), a violation of the Illegal Tax Stamp Act, a third degree felony, in violation of Utah Code Ann. § 59-19-106 (1992) (Count II), possession or use of methamphetamine in a drug-free zone with intent to distribute, a first degree felony, in violation of Utah Code Ann.

§ 58-37-8(2) (1992) (Count III), possession or use of lysergic acid diethylamide in a drug free zone with intent to distribute, a first degree felony, in violation of Utah Code Ann. § 58-37-8 (1996) (Count IV), unlawful possession of drug paraphernalia in a drug-free zone, a class A misdemeanor, in violation of Utah Code

Ann. § 58-37a-5(a) (1996) (Count VI),<sup>1</sup> and carrying a concealed weapon, a class A misdemeanor, in violation of Utah Code Ann. § 76-10-504 (1995) (Count VII) (R. 4-5).

Pursuant to a plea agreement, defendant pleaded guilty to a violation of the Clandestine Drug Lab Act (Count I), possession of lysergic acid diethylamide in a drug-free zone with intent to distribute (Count IV) and carrying a concealed weapon (Count VII), and Counts II, III and VI were dismissed (R. 36-42).

Prior to sentencing, the trial court ordered that defendant be committed to the custody of the Department of Corrections for a sixty-day diagnostic evaluation (R. 62; 1/27/95 h'g, T. 9).<sup>2</sup>

On March 24, 1995, following receipt of a presentence report and diagnostic evaluation, the trial court sentenced defendant to the statutory terms of five-years-to-life on the two first degree felonies and a term not to exceed one year on the class A misdemeanor, all sentences to run concurrently (R. 64-65).<sup>3</sup>

Defendant, pro se, mistakenly appealed, to this Court (R. 68). However, because the convictions were for first degree felonies, the appeal was directed to the Utah Supreme Court, which appointed the Utah County Public Defender Association to represent defendant (R. 74). Thereafter, the supreme court transferred the case back to this Court (R. 83).

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<sup>1</sup> Co-defendants Ethel Cindy Hall and Brenda Kinstad were charged in the same information with an additional offense in Count V (R. 4).

<sup>2</sup> The transcript of the initial sentencing hearing, held on January 27, 1995, is attached at Addendum A.

<sup>3</sup> The transcript of the final sentencing hearing, held on March 24, 1995, is attached at Addendum B.

Following its notice to the parties of its sua sponte motion for summary disposition and its receipt of memoranda, this Court denied the motion. The Court also denied defendant's motion for a remand to the trial court for an evidentiary hearing concerning ineffective assistance of trial counsel, pursuant to rule 23B, Utah Rules of Appellate Procedure.

#### STATEMENT OF THE FACTS

A presentence report (PSR) was prepared for the initial sentencing hearing held on January 27, 1995 (1/27/95 h'g, T. 2). The report set out defendant's lengthy criminal history, though it lacked a notation of the criminal dispositions (PSR at 5-8) and contained Adult Probation and Parole's (APP) recommendation that defendant be denied probation and sentenced according to statute (PSR at last page). Notwithstanding the recommendation, the trial court ordered defendant committed to the custody of the Department of Corrections for the preparation of a sixty-day diagnostic evaluation to determine whether any rehabilitative program might suit defendant's needs (R. 61-62; 1/27/95 h'g, T. 9). The court also ordered that the evaluation be provided to the court, the county attorney and defense counsel not later than five days before the final sentencing hearing on March 24 (R. 61).

The diagnostic evaluation (DE) was completed on March 22 and supplied to all parties the same day (R. 63, cover letter; R. 87 at 3). Although Ms. Betty Davies, Director of the Diagnostic Unit, noted that the evaluation was in some respects incomplete, owing to the departure of defendant's case worker a week earlier (DE 5), the evaluation touched on all the areas requested by the

trial court.<sup>4</sup> In accordance with the court's order, the evaluation updated defendant's criminal history, this time noting that defendant had been incarcerated three times when under the authority of the California Youth Authority (CYA) between 1969 and 1974 and that he once escaped from the CYA Institution (DE 2-3). Drawing on the attached report of Rosanita Cespedes, Ph.D., the evaluation set out the psychological tests administered to defendant, defendant's basic skill and intelligence levels and abilities, his multiple chemical and alcohol dependency, his antisocial personality disorder and his poor prognosis for treatment (DE 3). Ms. Davies also reported that she and the case worker assigned to defendant conducted the thinking errors assessment group in which defendant participated, and she identified and reported on several of defendant's errors (DE 4-5). Ms. Davies also conducted defendant's final interview, noting that in spite of defendant's appearing sincere in his wish to change his life and to care for his family, "changing would be so difficult as to be nearly impossible" (DE 5). The evaluation noted that the Diagnostic Unit had referred defendant to the Odyssey House treatment program, where he had been accepted, but

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<sup>4</sup> The Sixty-Day Evaluation Order stated:

1. Defendant is committed to the custody of the Division [sic] of Corrections for a period of sixty days, for a complete study of the defendant during that time, inquiring into such matters such as the defendant's previous delinquency or criminal experience, his/her social background, his/her capabilities, his/her mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his/her needs.

(R. 61-62).

that defendant was not anxious to go, thinking that he did not need treatment as intensive as that thought necessary by the Diagnostic Unit (DE 6). The evaluation concluded that based on defendant's first degree felony convictions, his prior criminal record, his poor prognosis for change, and the impossibility of assuring the protection of the community, defendant should be committed to the Utah State Prison (DE 6-7).

Defense counsel argued that he had only received the evaluation two days earlier and that he did not consider it complete or satisfactory in identifying available programs (R. 87 at 3-4). Defense counsel argued that defendant's case worker had inferred that there would be representatives from various programs available to interview defendant and because that had not happened, the purpose of the evaluation had not been accomplished. Nonetheless, counsel drew the court's attention to Dr. Cespedes' recognition that long-term inpatient treatment was a possible option, and counsel requested that defendant be given the opportunity to participate in the Odyssey House program (R. 87 at 5).

The trial court agreed that the purpose in sending defendant to the Diagnostic Unit was to see if there was an appropriate program, but that defendant's negative attitude toward the Odyssey House program confirmed the evaluators' assessment of defendant's poor prognosis (R. 87 at 8). Based on the evaluators' conclusion that defendant would not perform well at Odyssey House, the only appropriate program for defendant, the court sentenced defendant to prison (R. 87 at 8-9).

## SUMMARY OF ARGUMENT

### POINT I

The trial court did not abuse its discretion in relying on a satisfactory presentence report and a substantially complete diagnostic evaluation in sentencing defendant to prison. The diagnostic evaluation submitted to the trial court substantially met the prescribed statutory requirements. The director of the Diagnostic Unit, who wrote the evaluation, had personally participated in one of defendant's assessment group sessions and in his final interview. The diagnostic evaluation was supported by a psychological evaluation. The presentence report, the diagnostic evaluation and the psychological evaluation documented at length and without equivocation that defendant was unable to take responsibility for his actions and that he had a poor prognosis for rehabilitation and should be sentenced to prison. Defendant corroborated the accuracy of those reports when he refused the Odyssey House drug treatment program.

### POINT II

Defendant fails to show that his trial counsel's refusal to object to various aspects of the presentence report and diagnostic evaluation was unreasonable or other than trial strategy. Further, based on the adequacy of the diagnostic evaluation and defendant's prior criminal record, it is apparent that even had defendant objected as argued on appeal, it would have had no effect on the trial court's sentencing order.

## ARGUMENT

### POINT I

#### **DEFENDANT FAILS TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING DEFENDANT BASED ON RECOMMENDATIONS CONTAINED IN A SUBSTANTIALLY COMPLETE DIAGNOSTIC EVALUATION**

Defendant argues that because his case worker left the Diagnostic Unit a week before the diagnostic evaluation was written by Ms. Davies, director of the Unit, that he received an incomplete, unreliable ten-day evaluation, rather than the sixty-day evaluation order by the trial court. Therefore, he claims, the trial court abused its discretion in not ordering a additional diagnostic period prior to the imposition of sentence. Appellant's Br. at 7-9. The argument is without merit.

#### **A. The Standard of Review**

The imposition of sentence "*rests entirely within the discretion of the court, within the limits prescribed by law.*" State v. Peterson, 681 P.2d 1210, 1219 (Utah 1984) (emphasis in original) (citation omitted). "Before [the appellate court] will overturn the sentence given by the trial court, 'it must be clear that the actions of the judge were so inherently unfair as to constitute an abuse of discretion.'" State v. Rhodes, 818 P.2d 1048, 1051 (Utah App. 1991) (citing State v. Gerrard, 584 P.2d 885, 887 (Utah 1978). "[T]he appellate court can properly find abuse only if it can be said that no reasonable man would take the view adopted by the trial court. . . . [The appellate court] will not reverse or modify a sentence prescribed by law unless it is clearly excessive or unless the trial court abused its discretion." Gerrard, 584 P.2d at 887-88.



"The burden of showing error is on the party who seeks to upset the judgment." State v. Noren, 704 P.2d 568, 571 (Utah 1985) (quoting State v. Jones, 657 P.2d 1263, 1267 (Utah 1982)).

**B. The Diagnostic Evaluation was Substantially Complete and Reliable**

The diagnostic evaluation submitted to the trial court was substantially complete and met the prescribed statutory requirements:

(1)(a)(i) In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days.

(ii) The Department of Corrections shall conduct a complete study and evaluation of the defendant during that time, inquiring into matters including:

- (A) the defendant's previous delinquency or criminal experience;
- (B) his social background;
- (C) his capabilities;
- (D) his mental, emotional, and physical health; and
- (E) the rehabilitative resources or programs which may be available to suit his needs.

Utah Code Ann. § 76-3-404 (1995).

Notwithstanding Ms. Davies', the Unit Director, overly generous admission that the evaluation was not complete in all respects, the evaluation plainly addresses all of the requirements of section 76-3-404, with the possible exception of defendant's social background. That component, however, was more than amply addressed by the presentence report (PSR 9-11), letters of defendant's family and friends sent to defendant's

AP&P case worker which were incorporated into the presentence report (PSR 12-19) and other letters submitted to the trial court before sentencing (R. 47-60).

Defendant makes no suggestion about what might be missing from the evaluation, relying only on Ms. Davies' acknowledgment that the evaluation is incomplete in some respects because of the departure of defendant's case worker one week before the evaluation was submitted to the court. From these facts defendant argues that he obtained only a ten-day, rather than a sixty-day, evaluation. Appellant's Br. at 9. The contention is meaningless because there is no prescription that a person committed to the Department of Corrections for a diagnostic evaluation for a certain period of time must be continuously evaluated over that period. Moreover, Ms. Davies remarks in the evaluation refute the contention. Specifically, Ms. Davies noted that she and defendant's Diagnostic Unit case worker had conducted defendant's thinking errors assessment group (DE 4), thus showing that his case worker was involved in his assessment before his departure. Further, Ms. Davies' participation in defendant's assessment group and his final interview (DE 5), her obvious review of the record and Dr. Cespedes' evaluation (DE 3-4, 6), her contact with defendant's wife (DE 6) and her review of the case with the Diagnostic Unit staff (DE 7) show that she knew defendant's case and was able to generate a substantially complete report.

In support of his "belief" that the diagnostic evaluation was incomplete and unreliable, defendant cites State v. Lipsky, 608 P.2d 1241, 1244, 1248 (Utah 1980), and its progeny, for the proposition that the sentencing must be based on accurate

information. Appellant's Br. at 8. None of the cited authority is relevant to this case. See id. at 1248-49 (denial of due process where trial court failed to disclose presentence report to defendant prior to sentencing); State v. Johnson, 856 P.2d 1064, 1071-72 (Utah 1993) (sexual abuse treatment center report which consisted solely of double and triple hearsay was unreliable); Rhodes, 818 P.2d at 1050-51 (no abuse of discretion in refusing probation where the defendant had sufficient opportunity to attack the presentence report and there was ample factual substance in the record to support the sentencing).

Even if the evaluation was deficient in some respects, the trial court did not abuse its discretion in sentencing defendant to prison, rather than the outpatient treatment setting he was angling for, considering the substantial basis in the record that defendant was a poor prospect for rehabilitation. In State v. Carson, the defendant also claimed that the trial court had abused its discretion in not ordering a second ninety-day diagnostic evaluation, which the Department of Corrections had itself requested in order to determine if the defendant qualified for a sexual offender program. State v. Carson, 597 P.2d 862, 864 (Utah 1979). Noting that under section 76-3-404 the diagnostic evaluation was an optional tool available to, but not binding on, the trial court, the supreme court held that the evaluation submitted to the trial court constituted a sufficient factual basis on which to sentence the defendant. Id. at 864-66. See also Rhodes, 818 P.2d at 1051-52 (sufficient factual basis to deny probation based on the defendant's denial of responsibility, diagnostic staff's finding the defendant a marginal candidate for probation, the fears of the victims, the recommendations of the

prosecutor and the rejection by the two treatment facilities most likely to help the defendant).

C. The Trial Court had a Sufficient Basis  
On which to Sentence Defendant to Prison

At sentencing the trial court had a presentence report and a sixty-day evaluation, both of which concluded that defendant was not an appropriate candidate for supervised probation in a treatment program and that he should be sentenced to prison (PSR 20; DE 6-7). The evaluation was supported by the separate psychological evaluation of Dr. Cespedes, which identified five substance dependencies and found that defendant exhibited an antisocial personality and that his prognosis in treatment was poor (Psychological Evaluation, p. 3). The prosecutor also concurred with the recommendations of the diagnostic evaluation (R. 87 at 6-7), which also noted that defendant did not qualify for probation because of his conviction on first degree felonies and that if the CYA escape from custody charge were included, defendant would not qualify for anything but prison regardless of the degree of the felonies (DE 6).

At the conclusion of the initial sentencing hearing, the trial court was plainly disposed to sentence defendant to a program that would suit both the community's and defendant's needs, based on defense counsel's presentation of defendant as caring family man seduced by drugs at an early age and the prosecutor's acknowledgment that defendant had been "remarkably forthcoming" with information (1/27/95 h'g at 2-9). Ultimately, however, it was defendant that corroborated his evaluators' consensus that he was a poor prospect for rehabilitation, and consequently the propriety of the trial court's final sentencing

order, by his own conduct. Dr. Cespedes noted that defendant projected the appearance of an emotionally stable and predictable individual, but that he was deceitful, immature and self-centered, blaming others for his problems rather than accepting responsibility for them (Psychological Evaluation at 2-3). Ms. Davies also noted that defendant sounded sincere about wanting to take responsibility for his life and family, but that he blamed others for his addiction and blamed the system for not having earlier put him into a treatment program (DE 5). True to the evaluators' assessments, defendant "begged" prior to sentencing to be put on a program in order to assist his family (PSR 4), but he rejected the demanding Odyssey House treatment program when it was offered to him (DE 6). As Ms. Davies astutely observed, "Sincere or not, changing would be so difficult as to be nearly impossible" (DE 5). See State v. Sweat, 722 P.2d 746, 747 (Utah 1986) (per curiam) (no abuse of discretion in sentencing the defendant to prison rather than a substance abuse program where the evaluation team found the defendant not serious about changing his behavior). In sum, the trial court did not abuse its discretion in sentencing defendant to prison, rather than ordering an additional diagnostic evaluation.

## **POINT II**

### **DEFENDANT HAS FAILED TO DEMONSTRATE THAT TRIAL COUNSEL WAS INEFFECTIVE**

Defendant claims that his trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), in failing (1) to request an additional diagnostic commitment to complete the evaluation, (2) to alert the trial court to two mitigating circumstances omitted from the matrix,

(3) to object to having received the diagnostic evaluation only one and one-half days before sentencing and (4) to identify other treatment options or to allow defendant to testify about his willingness to participate in a treatment program. Appellant's Br. at 9-12. The claim is unsupported by the record.

**A. The Legal Standard for Proving Ineffective Assistance of Counsel**

In State v. Templin, 805 P.2d 182 (Utah 1990), the Utah Supreme Court adopted the two-part test set out in Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052 (1984), in evaluating a claim of ineffective assistance of counsel.<sup>5</sup> The defendant must first "identify the acts or omissions" which, under the circumstances, "show that counsel's representation fell below an objective standard of reasonableness." Id. at 186. This requires a showing that counsel's errors were so serious that he was not functioning as "counsel" as guaranteed by the Sixth Amendment. Id. Secondly, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. 186-87. The defendant has the

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<sup>5</sup> The State notes in passing that Strickland dealt only with an ineffective assistance claim in a capital sentencing: "We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance." Id. at 686, 104 S. Ct. at 2064. The State is aware of only one Utah case, Parsons v. Barnes, 871 P.2d 516 (Utah), cert. denied, 115 S. Ct. 431 (1994), also a capital case, in which the Strickland standard has been considered in a sentencing context. Id. at 525-26. However, since the question of the appropriate standard is not directly at issue, for the purposes of this brief, the State does not dispute the application of Strickland in this sentencing.

burden of proof with respect to both prongs of the Strickland test. Id. at 186. "Defendant has the burden of demonstrating that counsel's 'performance fell below an objective standard of reasonable professional judgment,' and that counsel's actions were not conscious trial strategy." State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992).

Defendant's burden is heavy:

In proving the first prong of the Strickland test, the defendant must point to specific instances in the record where counsel's assistance was inadequate. Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. In so doing, the defendant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065. "This court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." [State v. Tennyson, 850 P.2d [461], 465 [(Utah App. 1993)] (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; State v. Pascual, 804 P.2d 553, 556 (Utah App. 1991))].

State v. Strain, 885 P.2d 810, 814 (Utah App. 1994).

**B. Defense Counsel's Performance at Sentencing Was Reasonable and Professional**

Defendant claims that his trial counsel was ineffective in failing (1) to request an additional diagnostic commitment to complete the evaluation, (2) to alert the trial court to two mitigating circumstances omitted from the matrix, (3) to object to having received the diagnostic evaluation only one and one-half days before sentencing and (4) to identify other treatment options or to allow defendant to testify about his willingness to participate in a treatment program. Appellant's Br. at 9-12.

The claim is unsupported by the record. Addressing defendant's claims in serial fashion, defense counsel's performance was reasonable : (1) there was no genuine basis for objecting to a substantially complete diagnostic evaluation, although, in fact, defense counsel did so object (R. 87 at 3-4); (2) although defense counsel did not specifically point out the omissions on the matrix itself (which could not have affected defendant's chances for probation based on his first degree felony convictions), he pointedly brought to the court's attention, which the court acknowledged, letters attesting that defendant had good employment prospects and family relations and that his imprisonment would be a significant hardship on his family (1/27/95 h'g at 6-7); (3) there was no substantial legal basis for requesting a continuance to challenge an evaluation received two days before sentencing, even if the trial court had originally ordered that the report be supplied to all parties five days before the sentencing; and (4) considering the extent of defendant's drug dependency, there were no treatment options other than Odyssey House, and based on defendant's having previously rejected that treatment option, allowing him to testify about his willingness for treatment would have appeared as nothing more than an exhibition of bad faith.

In fact, it is apparent that defense counsel did an excellent job in recognizing and then responding to the way the wind was blowing at the sentencing, a direction that defendant himself created. Counsel effectively downplayed the extent of defendant's expanded criminal history, brought to light in the diagnostic evaluation, by observing that all had parties had recognized its extent at the initial hearing, but that the real



purpose of the evaluation, to locate other available programs, had been accomplished R. 87 at 4). Notwithstanding his argument, and recognizing the obvious force presented by the uniform opinions of defendant's multiple evaluators, counsel wisely encouraged the trial court to send defendant to Odyssey House (R. 87 at 5, 8). In sum, defense counsel reasonably represented defendant at sentencing.

**C. Defendant Fails to Show that He was Prejudiced by Counsel's Performance**

Even if the Court found that defense counsel performed ineffectively in failing to make the various challenges and clarifications argued on appeal, defendant's claim of ineffective assistance would still fail under the second prong of Strickland, which requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland 466 U.S. at 694, 104 S. Ct. at 2068. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693, 104 S. Ct. at 2067. Accord Codianna v. Morris, 660 P.2d 1101, 1107 (Utah 1983); State v. Lovell, 758 P.2d 909, 913 (Utah 1988); State v. Frame, 723 P.2d 401, 405 (Utah 1986). If the defendant fails to make the required showing of either deficient performance or of sufficient prejudice as a result of counsel's error, then defendant ineffectiveness claim is defeated." State v. Grueber, 776 P.2d 70, 76 (Utah App.), cert. denied, 783 P.2d 53 (Utah 1989).

Defendant merely speculates that his counsel's conduct was deficient. Rather, it is apparent that even if counsel had acted in accord with defendant's argument on appeal, the trial court

would not have sentenced defendant differently, based on defendant's prior record and the force and consistency with which defendant's various evaluator's found him a poor prospect for rehabilitation.

**ORAL ARGUMENT NOT REQUESTED**


Based on this Court's prior development of the issues raised in this case, the State does not request oral argument.

**CONCLUSION**

For the reasons stated, this Court should affirm defendant's convictions.

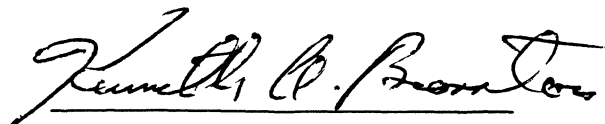
RESPECTFULLY SUBMITTED this <sup>th</sup>26 day of April, 1996.

JAN GRAHAM  
Attorney General

  
KENNETH A. BRONSTON  
Assistant Attorney General

**CERTIFICATE OF MAILING**

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed first-class, postage prepaid, to Margaret P. Lindsay, Utah County Public Defenders Assoc., attorneys for defendant, 40 South 100 West, Suite 200, Provo, Utah 84601, this <sup>th</sup>26 day of April, 1996.



ADDENDA

## ADDENDUM A

ORIGINAL

1 IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

2 STATE OF UTAH

3 =====

4 STATE OF UTAH, ) SENTENCING HEARING

5 Plaintiff, ) Case No. 941400767

6 vs. )

7 CASPER DUNKEL, ) Hon. Ray M. Harding

8 Defendant. )

9  
10  
11 BE IT REMEMBERED that on the 27th day of  
12 January, 1995 this matter came on regularly for  
13 hearing before the above-named Court.

14 WHEREUPON, all parties appearing and  
15 represented by counsel, the following proceedings  
16 were held:

17 A P P E A R A N C E S

18 FOR THE PLAINTIFF:

19  
20 CRAIG R. MADSEN, ESQ.  
DEPUTY UTAH COUNTY ATTORNEY  
21 100 EAST CENTER, STE 2100  
PROVO, UT 84606

22 FOR THE DEFENDANT:

23 LEE RASMUSSEN, ESQ.  
24 211 EAST 300 SOUTH, STE 213  
SALT LAKE CITY, UT 84111

FILED

Utah Court of Appeals

NOV 13 1995

Marilyn M. Branch  
Clerk of the Court

950523

25  
PENNY C. ABBOTT, CSR - (LIC. NO. 93)  
10445 SOUTH 600 EAST - SALEM, UT 84653  
PHONE: 423-1009

CA

1                                   P R O C E E D I N G S.

2                   THE COURT:   Number 12, State of Utah  
3                   versus Dunkel.

4                   MR. MADSEN:   Mr. Rasmussen I think is  
5                   speaking with Mr. Dunkel through the window.  
6                   They'll be right here.

7                   THE COURT:   Okay.   This is the time set  
8                   for pronouncement of sentence in this matter.   Is  
9                   there any legal reason why sentence should not now  
10                  be imposed?

11                  MR. RASMUSSEN:   There is none, Your  
12                  Honor.

13                  THE COURT:   Very well.   Any statement that  
14                  you would like to make prior to imposition of  
15                  sentence?

16                  MR. RASMUSSEN:   I would, Your Honor.   I  
17                  have reviewed the presentence report.   I find it a  
18                  little disturbing to look and see all these things  
19                  of not available, not available, not available.

20                  I took an opportunity to kind of check on  
21                  some of these things.   I've been able to determine  
22                  that a lot of these not available ones are strictly  
23                  from investigative stops that were made for, from  
24                  probation where they, in California they  
25                  automatically take fingerprints when they do that

                  PENNY C. ABBOTT, CSR

1 and they are provided to the California Bureau of  
2 Investigation and then they are automatically  
3 entered in the current criminal history without a  
4 disposition.

5           There's no disposition to obtain. In  
6 most of these, these were various charges that he  
7 was brought back in on for checking. I could go  
8 back and just give you a flavor of them. The first  
9 one there I believe is in September of '67. He was  
10 only questioned in that particular matter that  
11 somebody else was arrested. He was never, ever  
12 charged in that. I believe it was a girlfriend of  
13 his or boyfriend that ended up with it.

14           There are a lot of duplications of  
15 charges. In looking at his juvenile record, in  
16 '68 the two failures to appear are really the same  
17 ticket in August and October of '68. This is for  
18 sleeping on the beach, for being on the beach.  
19 That's kind of the flavor.

20           I find one of them here that's kind of  
21 interesting. The charges on, from the Riverside  
22 County Sheriff's Office on July 29th of '76, March  
23 25th of '77, June 30th of '79 and subsequently out  
24 of New Orleans are all from the same central  
25 focus. They are all one particular case which was

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1 a misdemeanor case. That's why there's not  
2 dispositions available. And this was just simply a  
3 fine which he had failed to pay.

4 As I have gone over his record I find that  
5 the last conviction, the felony conviction that he  
6 has was in 1977. I think that there's some  
7 interesting things that happened in Casper's life  
8 in about that particular time. He seems to take a  
9 big change. He's been on probation for a period of  
10 time then with the California Youth Authority and  
11 he seems to stay pretty crime free from '77 up  
12 until this particular episode, with the exception  
13 of I believe he has a couple DUIs, driving under  
14 the influence in there.

15 Casper in about that time of life began to  
16 settle down. It really settled down I think 12  
17 years ago when he got married to his present wife,  
18 and she's in the courtroom today. But when he got  
19 married he obtained custody of his infant son from  
20 a, or a two year old son at that time, from a  
21 previous marriage. He, or his wife has adopted  
22 that child now.

23 They've also adopted two children who are  
24 disadvantaged children. They have a son who is  
25 autistic and who has, actually had been doing very



1 well as long as there was funds to support him.  
2 He has currently been placed in a group home for  
3 autistic children because well, Casper's not  
4 working in the legal occupation of a journeyman  
5 electrician, there's not funds to provide for the  
6 care of this particular child and they've been  
7 forced to put him in a group home.

8           They also adopted a disadvantaged daughter  
9 who was educationally disadvantaged. Not from her  
10 mental ability but because she had been, hadn't had  
11 the opportunity to go to school and she was way  
12 behind in her grade development. She is now up to  
13 grade level, performing adequately and acceptably  
14 for grade level for her age. In fact, the family  
15 was awarded from the school some meritorious thing  
16 for how they have been able to help this child get  
17 up to where she should be.

18           He's been basically a good family man in  
19 the, you know, raising these children in a  
20 substantial marriage. His wife is here today  
21 along with his son. We had asked that the children  
22 didn't come because this is probably someplace they  
23 don't need to see their dad. The younger children  
24 have stayed home but his one son who is 17 now was  
25 insistent on being here and he's in the courtroom

1 today along with some other family members.

2 His wife would like to address the Court  
3 but she has a heart problem and Casper has asked  
4 that, he thinks that's too much stress on her.

5 THE COURT: Well, I've read her letter to  
6 the Court--

7 MR. RASMUSSEN: Yes. They are--

8 THE COURT: And I suspect she doesn't  
9 have anything to add to that.

10 MR. RASMUSSEN: I don't think so. But  
11 she wants you to know that even with her health  
12 problem, which is a heart condition, that she is  
13 prepared to demonstrate to the Court her support  
14 for her husband which I think speaks something  
15 well.

16 In going through this case with Mr. Madsen  
17 we entered into a stipulation which I think is very  
18 important. And I'm sure the Court has read that  
19 stipulation. But that stipulation basically says  
20 that Casper really didn't know what he was doing.  
21 He was probably a first time trier, trying to  
22 produce methamphetamines. He was, didn't have the  
23 ability to do it either with the chemicals that  
24 they had or the knowledge that he had. He  
25 certainly did have a precursor to the development

1 of it which fits the statute, and there's no  
2 question that what he entered a plea to is a  
3 violation of the law. But as far as having the  
4 sophisticated knowledge to produce the product  
5 which would be used for sale, they were off base in  
6 this particular episode.

7 He is a journeyman electrician. He  
8 learned that skill while he was in probation.  
9 That skill has served-- Through the California  
10 Youth Authority. That skill has served him  
11 well. He has been able to make a satisfactory  
12 living.

13 He has always had a problem with narcotics  
14 and that problem with narcotics has escalated and  
15 gotten him into deep trouble, very deep trouble at  
16 this particular time. But I think that there are  
17 some things that are alternative to prison then  
18 that the AP&P has recommended that may be  
19 beneficial to him and to his family and I hope to  
20 society. He does have a lot to offer.

21 And I would recommend that the Court place  
22 him on probation, that they put him in appropriate  
23 controls, perhaps intensive supervised probation  
24 and programs which can address his narcotics  
25 problem and teach him those skills that when he's

PENNY C. ABBOTT, CSR

1 depressed, that when he's stressed that he does not  
2 have to turn to narcotics to satisfy or to overcome  
3 these problems that he has in his life.

4 We would request that you reject the  
5 recommendations of AP&P and place him on a form of  
6 probation with required programs.

7 THE COURT: Mr. Madsen?

8 MR. MADSEN: Your Honor, I have examined  
9 the report. I've also received information  
10 through Counsel, from the time of this arrest this  
11 defendant has become I think fairly remarkably  
12 forthcoming with his information. He has never  
13 denied culpability and has provided a lucid account  
14 of the events.

15 I have examined the situation with the  
16 defendant. I am prepared to stipulate to a  
17 diagnostic, to see if the diagnostic unit can find  
18 something that will meet the requirements of the  
19 offense and meet the requirements of the defendant,  
20 but more importantly meet the requirements of the  
21 community. I can't have cooks of methamphetamine  
22 in the county. It's a dangerous drug and it's a  
23 dangerous procedure and this one was being  
24 attempted in the middle of an overcrowded trailer  
25 park.

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So I am prepared to stipulate to a  
diagnostic report.

THE COURT: I'm glad to hear that because  
that's the Court's inclination upon review of the  
matter. All right. I am going to stay imposition  
of sentence at this time. Order the defendant  
remanded to the custody of the Utah County Sheriff  
to be transported to the Department of Corrections,  
Utah State Prison for a 60-day diagnostic  
evaluation, for them to review his status and make  
recommendations relative to an appropriate program  
for his drug addiction. That he be returned to  
this Court with a written report with their  
recommendations on or before--

THE CLERK: March 24th.

THE COURT: The 24th of March at 8:00  
o'clock A.M. Thank you, Counsel.

MR. RASMUSSEN: Thank you, Your Honor.

WHEREUPON, the proceedings were concluded.

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## ADDENDUM B

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IN THE FOURTH DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

=====

STATE OF UTAH,	)	SENTENCING
	)	
Plaintiff,	)	Case No. 941400767
	)	
vs.	)	
	)	
CASPER M. DUNKEL,	)	Hon. RAY M. HARDING
	)	
Defendant.)	)	
_____	)	

ORIGINAL

BE IT REMEMBERED that on the 24th day of  
March, 1995 this matter came on for hearing before  
the HONORABLE RAY M. HARDING, Judge of the  
above-named court.

WHEREUPON, the plaintiff and defendant both  
appearing and represented by counsel the following  
proceedings were held:

CSR LICENSE #93



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A P P E A R A N C E S

FOR THE PLAINTIFF:

CRAIG MADSEN, ESQ.  
DEPUTY UTAH COUNTY ATTORNEY  
100 EAST CENTER STE 2100  
PROVO, UT 84606

FOR THE DEFENDANT:

LEE RASMUSSEN, ESQ.  
211 EAST 300 SOUTH, STE 213  
SALT LAKE CITY, UT. 84111

=====

I-N-D-E-X

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STATEMENT BY DEFENSE	3, 7
STATEMENT BY STATE	6
JUDGMENT AND SENTENCE	8

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P-R-O-C-E-E-D-I-N-G-S

THE COURT: #21, State of Utah versus Dunkel. This is the time set for pronouncement of sentence in this matter. Any legal reason why sentence should not now be imposed?

MR. RASMUSSEN: There is none.

THE COURT: Any statement that you'd like to make prior to the imposition of sentence?

MR. RASMUSSEN: Yes, Your Honor, there is. I'm sure that you've had the opportunity to read the diagnostic report. I received it late in the afternoon of the 22nd and went through it.

I'm actually a little discouraged with this report. In having talked with Mr. Dunkel this morning, to me it's a regurgitation of the presentence investigation with the one letter from, or the evaluation from the psychologist there.

In addition, what I've learned is that Paul Larsen, who was the evaluator that was assigned to Mr. Dunkel, during the middle of this evaluation retired or left the services. I don't know necessarily under the greatest-- I don't know under what cloud or even if there was a cloud but he is gone and didn't find this. Consequently I think the Court probably, I hope the Court read

1     into here that this was not what I would consider a  
2     complete evaluation or what I hoped to see that the  
3     diagnostic unit would do down there.

4             When we left here we knew about his  
5     criminal record and I think the clear intent of the  
6     Court was to see if there was a program that was  
7     available to him. I don't even know that  
8     Mr. Dunkel was afforded that opportunity under  
9     Ms. Davies and her writing of this report. I know  
10    Mr. Larsen had made promises to, or inferences or  
11    promises I guess, to Mr. Dunkel that there would be  
12    people there from various programs to talk to  
13    him. That never ever occurred. I don't know if,  
14    what these people really determined, or perhaps it  
15    would have the same results, I don't know. But  
16    absent that I don't think we accomplished the  
17    purpose that he was sent to the diagnostic unit  
18    for.

19            There are some inaccuracies in the report,  
20    none that I think would be influential to the Court  
21    one way or the other. One that I would probably  
22    like to draw to the Court's attention is that he  
23    does have contact with his children including the  
24    son by the previous marriage, and he has taken  
25    responsibility for those types of things.

PENNY C. ABBOTT, CSR

1           It appears to me that, that (inaudible),  
2   the Ph.D. who interviewed him did make an  
3   observation that a long term intensive structured  
4   in-patient program utilizing cognitive  
5   restructuring in groups and individual therapy are  
6   recommended.   And she's saying that not as a  
7   recommendation but as a possible option.   That's  
8   what I thought we sent Mr. Dunkel to the prison to  
9   determine, if there was an option.

10           It appears from my reading that if that's  
11   what the Court is looking for there is, they've  
12   only recommended one program and that being the  
13   Odyssey House in Salt Lake City.   And even though I  
14   think he's been short-<sup>is, short-term?</sup>termed a little bit on the  
15   diagnostic evaluation I still think that they have  
16   said that this type of program would be beneficial  
17   to him if the Court felt that that was  
18   appropriate.   And we would certainly recommend  
19   that he be given that opportunity.

20           He's still the strong-- I mean that we  
21   know that so few people really complete this  
22   program that if he's adequately motivated he's  
23   going to benefit and be available to his family.  
24   If he doesn't, he's not going to be present.   So  
25   we would recommend that the Court place him in that

PENNY C. ABBOTT, CSR

1 program.

2 THE COURT: Okay.

3 MR. RASMUSSEN: Did you want to say  
4 something?

5 (Inaudible discussion with defendant?)

6 THE COURT: Mr. Madsen?

7 MR. MADSEN: Well, Your Honor, I think  
8 that it's somewhat of an incorrect characterization  
9 to say that they didn't consider programs or didn't  
10 consider other programs. They did a psychological  
11 evaluation on this defendant and identified five  
12 substance dependencies for abuse and antisocial  
13 personality disorders. And then they indicate  
14 treatment is unlikely to succeed because they know  
15 (inaudible) referrals, that he was referred to  
16 Odyssey House and that they did agree to accept him  
17 but Mr. Dunkel is the one who is not anxious to go  
18 to Odyssey House, anything that long or intensive,  
19 because he doesn't think he needs that much  
20 treatment. And they think he needs more treatment  
21 than is even available at Odyssey House.

22 And the simple fact is they did evaluate  
23 him, did determine he had an intensive need for  
24 treatment. He admits to be an abuser for more than  
25 30 years and that his belief is he doesn't need

PENNY C. ABBOTT, CSR

1 that much treatment, that makes him untreatable.  
2 It's not that the program won't do him any good,  
3 it's that he doesn't think he needs the program.

4 Furthermore, they said that the justice  
5 requirements they believe validates prison, and  
6 they even go so far as to say if they had included  
7 the California Youth Authority escape from custody  
8 charge, he would have not qualified for anything  
9 other than prison, no matter what the degree of  
10 offense has been, with his previous record.

11 I think that they have very carefully  
12 evaluated this defendant. They've referred him to  
13 programs, they've had him examined, they've had him  
14 psychologically evaluated and they've made a  
15 determination that he's just not treatable in the  
16 current disposition, the personal disposition, his  
17 personal beliefs about his problems and his  
18 recognition of what needs to be done about them.

19 THE COURT: Mr. Rasmussen?

20 MR. RASMUSSEN: Well, I don't know if we  
21 just added the programs in the plural on there by  
22 accident or not. I think that he's only been  
23 referred to one program. I think all of us in this  
24 situation would prefer not to go to Odyssey with  
25 that recommendation. I certainly wouldn't want to

PENNY C. ABBOTT, CSR

1 go there no matter what it accomplished. But if  
2 that's the type of program that they feel that  
3 could help him, and our purpose in sending him was  
4 finding something that could help him, maybe that's  
5 where we should send him.

6 THE COURT: Well, Counsel, I agree that  
7 that was in fact the purpose of sending him for the  
8 diagnostic was to see if there was an appropriate  
9 program. The evaluation clearly indicated that  
10 his motivation for therapy was poor and he, I think  
11 that there was a serious question about his ability  
12 to perform in any program even though they  
13 recommended, and as you read the recommendation I  
14 think you're right, the only program that fits the  
15 characterization of the evaluator would be the  
16 Odyssey House. He was then referred to or  
17 recommended possibly to the Odyssey House and I  
18 think his negative attitude towards that program  
19 indicates that he confirms the evaluator's position  
20 that he would not perform well. And I don't think  
21 we have the resources to waste on someone who we  
22 know going in is not going to make the requisite  
23 efforts.

24 It'll be the judgment and sentence of this  
25 Court that the defendant serve a term of from five

1 years to possibly as long as life in the Utah State  
2 Prison on the first degree felony; and a term of  
3 not to exceed one year in the Utah County Jail on  
4 the Class A misdemeanor. The Court will order  
5 those terms to run concurrently. Court will  
6 remand the defendant to the custody of the  
7 Department of Corrections to commence serving the  
8 term as prescribed by law.

9 MR. MADSEN: Thank you, Your Honor.

10 THE COURT: Thank you, Counsel.

11 WHEREUPON, the proceedings were concluded.

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PENNY C. ABBOTT, CSR

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REPORTER'S CERTIFICATION

STATE OF UTAH )  
 ) SS.  
COUNTY OF UTAH )

I, Penny C. Abbott, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify that I received the electronically recorded tape #9537 in the matter of State vs. Casper M. Dunkel and that I transcribed it into typewriting, and that a full, true and correct transcription of said hearing so recorded and transcribed is set forth in the foregoing pages numbered 1 through 9, inclusive and that said pages constitute an accurate and complete transcript of all the testimony and proceedings adduced at the proceedings and contained on the tape except where it is indicated that the tape recording was inaudible.

WITNESS my hand and official seal this 6th day of June, 1995.

 *Penny C. Abbott*  
PENNY C. ABBOTT, CSR.  
Notary Public  
9-24-96 Commission Exp.

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